Reasons for Denying the Writ

The case raises no open question of federal law and was correctly decided.

I

State law requires surrender of the instrument as a prerequisite to payment.

Section 134 of the Negotiable Instruments Law [2] requires that the instrument "must be exhibited to the person from whom payment is demanded, *and when it is paid must be delivered up to the party paying it*" (emphasis supplied).

The courts below properly held that petitioner's failure or inability to meet this state law requirement was fatal.[3]

II

The petition raises no important federal question.

As noted above, petitioner's asserted "federal" issue was not argued below. Quite apart from its untimely assertion, petitioner's asserted "federal" issue is irrelevant in any event. Petitioner concedes that she is not the holder of the instrument, has never delivered it up for payment and never furnished any consideration for the instrument; under the settled state law of negotiable instruments petitioner has no cause of action in the first instance.

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[2] "Because the transaction involved here occurred before the effective date of the Uniform Commercial Code, the Negotiable Instruments Law applies. N. Y. Uniform Code §§10-101, 10-105 (McKinney 1964)" App. 8a.

[3] "It is not contested that New York law is applicable herein." App. 3a, n. 2.

The arguments now advanced by petitioner do not present genuine issues of federal law but are simply a rehash of rejected state law remnants seasoned with liberal mention of 12 U. S. C. §604 to produce an appearance of federal flavor. Distilled to its essence, the petition is a restatement of the same diversionary state law arguments raised below. Before two courts below petitioner sought to distract attention from her lack of a cause of action by arguing that the case really rested on rules of evidence, statutes of limitation, interpleader statutes and other irrelevant technicalities. The same old arguments now appear under pilfered federal flag.

Petitioner's argument (Pet. p. 10) based upon the "separate entity" theory stems from petitioner's earlier diversionary argument about the need for presentment. Both arguments are completely irrelevant. The complaint was dismissed not upon the technical ground that failure to make presentment had discharged the drawer, but, rather, upon the more fundamental ground that petitioner was not the holder of the instrument and was not prepared to deliver it up for payment. This was the basis of respondent's motion and is simply and clearly stated in the opinion of the Court of Appeals:

> "The Bank eventually moved in the district court for summary judgment on the ground that the N. Y. Negotiable Instruments Law §134 required that the instrument be surrendered before the Bank could be called upon to pay. Since plaintiff concededly does not have the sight draft, which is still in Uruguay, Judge Cannella granted summary judgment. The judge left open the possibility that at some future time the Bank might be liable to pay plaintiff if she established the right to possession of and title to the draft" (App. 8a-9a).

In short, it is not an actual or putative interpretation of 12 U. S. C. §604 which leaves petitioner "without remedy" in this case (Pet. p. 13). Rather, it is petitioner's failure ever to have been an owner, purchaser, holder or deliverer of the instrument sued upon which has established that petitioner never had a cause of action.

Petitioner's further suggestion (Pet. p. 13) that respondent national bank "refuses to take any steps toward payment of its obligation" is irresponsible in light of the thoroughly documented history of attempts by respondent to facilitate settlement between the rival claimants in this family dispute. This suggestion is made in especially ill grace in light of the failure of petitioner's attorney to respond to or acknowledge in any way respondent's further offer of assistance made in the months since the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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